ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity

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Case No. 2007-CP-46-4305

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SunTrust Mortgage, Inc.,. . . . . Respondent,

v.

Mark Ostendorff,. . . . . Appellant.

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Respondent SunTrust Mortgage, Inc. ("SunTrust") accepts the statement of the issues for appellate review set forth in Appellant's final brief.

STATEMENT OF THE CASE

In accordance with Rule 208(b)(2) SCAR, Respondent disputes Appellant's Statement of the Case and hereby restates the case.

Respondent SunTrust instituted foreclosure proceedings against the Appellant Ostendorff under the terms of its construction loan's promissory note and mortgage. On November 30, 2007, Respondent SunTrust filed its foreclosure Complaint, and on December 4, 2007, a private process server personally served Appellant Ostendorff. On January 3, 2008, Appellant Ostendorff served his Answer and Counterclaim. (Answer and Counterclaim, ROA 23-26). The Counterclaim demanded a jury trial and asked for $1,125,000.00 in damages because of Respondent SunTrust's alleged wrongful termination of his construction draws. On April 4, 2008, the Chief Circuit Court Judge for York County referred the matter to Judge S. Jackson Kimball, III, Master-In-Equity for York County.

On November 4, 2009, Respondent SunTrust filed its Motion for Summary Judgment (Motion for Summary Judgment, ROA 89) regarding the Counterclaim (the "Motion"), along with the affidavit of Susan Walker, First Vice President of Respondent SunTrust. On December 4, 2009, Appellant Ostendorff served his first affidavit, and on December 7, 2009, Appellant Ostendorff served his second affidavit. On December 10,

2009, Judge S. Jackson Kimball, III, Master-In-Equity for York County, held a hearing on the Motion. On December 18, 2009, Judge Kimball entered an order granting the Motion. (Order for Summary Judgment, ROA 12-17). On January 7, 2010, Appellant served his first notice of appeal stating that he did not receive a copy of the order granting the Motion until January 7, 2010. (First Notice of Appeal, ROA 146-147). This Court assigned Appellant Ostendorff's first appeal Case Tracking No.: 2010150386.

Although the Motion was made only with respect to the counterclaims, the December 18, 2009 order also addressed the underlying foreclosure. The order states in part that: "As to Plaintiffs claim for foreclosure, I find, and Defendant did not refute, that as of September 2, 2009, Defendant is indebted to SunTrust for the total amount of $455,115.83, consisting of principal in the amount of $393,042.10, and interest in the amount of $62,073.73. Interest continues to accrue on the Note at $72.68 per day." The order also states that: "there is no genuine issue of fact concerning Plaintiff's assertion of Defendant's default under the note and mortgage." Because the order also addressed the underlying foreclosure, Judge Kimball stayed the foreclosure proceeding pending the outcome on appeal.

On November 14, 2012, this Court affirmed the decision of Judge Kimball in granting SunTrust's motion for summary judgment. (Order Affirming Summary Judgment, ROA 148-150). On or about January 17, 2013, Defendant filed his Petition for Writ of Certiorari to the South Carolina Supreme Court (the "Petition")(Appellate Case No. 2013-000144). (Petition for Writ of Certiorari, ROA 151-162). Because of this Court's affirmation, on August 2, 2013, Judge Kimball entered an order lifting his stay of the foreclosure proceeding. On October 1, 2013, Judge Kimball entered an order allowing the

foreclosure sale and signed a notice of sale stating that the foreclosure sale of Appellant's property be held on November 4, 2013 at 11:00 AM. However, on November 1, 2013 at 11:45 AM, Appellant filed Chapter 7 bankruptcy case number 13-06566 in the United States Bankruptcy Court for the District of South Carolina (Notice of Bankruptcy Filing, ROA 163-164). Therefore, the foreclosure sale never took place on November 4, 2013.

On November 1, 2013, Appellant Ostendorff served his second notice of appeal (Second Notice of Appeal, ROA 165-166) in the same foreclosure case. On August 21, 2014, the South Carolina Supreme Court denied Defendant's Petition for Writ of Certiorari. (Order denying Petition for Writ of Certiorari, ROA 167). On September 19, 2014, Appellant Ostendorff served his notice of intent to appeal to the United States Supreme Court.

FACTS

Appellant Ostendorff obtained a construction loan from Respondent SunTrust. To secure the indebtedness evidenced by a promissory note in the original principal amount of $400,000.00 (the "Note"), on or about March 29, 2006, Appellant Ostendorff executed a mortgage (the "Mortgage") in favor of Respondent SunTrust conveying a first priority security interest in certain real property commonly known as 1207 Cabin Creek Court, Fort Mill, South Carolina 29715, and more particularly described therein (the "Property"). (Walker Affidavit, ¶ 6 and Exhibit "A", ROA 93). The Mortgage was recorded in the Office of the Register of Deeds for York County, South Carolina, on or about April 28, 2006, at Book 07985, Page 00302. (Walker Affidavit, ¶ 7 and Exhibit "A", ROA 93). Respondent SunTrust is the owner and holder of the Note and the

Mortgage, and the Note and Mortgage have not been securitized. (Walker Affidavit, ¶ 9, ROA 94).

Appellant Ostendorff failed to make scheduled payments under the Note and Mortgage as required by their terms; consequently, Appellant Ostendorff defaulted and remains in default on the payments due under and pursuant to the Note and the Mortgage. (Walker Affidavit, ¶ 10 and ¶ 14, ROA 94-95). As of October 14, 2007, the Appellant Ostendorff was due for the July 1, 2007 payment. (Walker Affidavit, ¶ 11, ROA 94). On October 14, 2007, the Appellant Ostendorff' s arrearage on the Note was $12,065.85. (Walker Affidavit, ¶ 12, ROA 94). Therefore, in accordance with the terms of the Note and Mortgage, Respondent SunTrust accelerated maturity and declared the entire unpaid balance immediately due and payable. (Walker Affidavit, ¶ 13, ROA 94).

As of September 2, 2009, Appellant Ostendorff is indebted to Respondent SunTrust for the total amount of $455,115.83, consisting of principal in the amount of $393,042.10 and interest in the amount of $62,073.73. (Walker Affidavit, ¶ 18, ROA 96). Interest continues to accrue on the Note at $72.68 per day and other charges continue to accrue. (Walker Affidavit, ¶ 19, ROA 96). The attorney foreclosure records reflect that on October 8, 2007, a letter (the "Acceleration Letter") was sent to the Appellant Ostendorff via certified mail, notifying him that he was in default and that without further demand, Respondent SunTrust was entitled to accelerate the debt and bring a lawsuit for foreclosure. (Tatum Affidavit, ¶, ROA 143).

In his Counterclaim (Answer and Counterclaim, ROA 23-23), Appellant Ostendorff claims that he could have finished the improvements on the Property if SunTrust had not stopped the construction draws. (Counterclaim, ¶¶ 5-6, ROA 23-26).

However, On November 4, 2009, Respondent SunTrust filed its Motion for Summary Judgment (Motion for Summary Judgment, ROA 89) regarding the Counterclaim (the "Motion"), and on December 10, 2009, Judge Kimball granting the Motion. (Order for Summary Judgment, ROA 12-17). Appellant filed his first appeal, and this Court assigned Appellant Ostendorff' s first appeal Case Tracking No.: 2010150386. On November 14, 2012, this Court affirmed the decision of Judge Kimball in granting SunTrust's motion for summary judgment. (Order Affirming Summary Judgment, ROA 148).

ARGUMENTS

In his Initial Brief, Appellant Ostendorff finds thirteen errors in the Lower Court's findings that Respondent SunTrust was entitled to foreclose the real property at issue. In order to preserve an issue at trial for appeal, the appellant must show that the matter was " ... (1) raised to and ruled upon by the trial court (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal, *et al.*, Appellate Practice In South Carolina, 51 (2d ed., 2002). Also, all objections must be clearly and sufficiently specific so that the precise nature of the error can be reasonably understood by the trial judge. Id. referencing Wilder Corp. vs. Wilke, 330 S.C, 71,497 S.B.2d 731 (1998). In this case, the Appellant did not make a specific objection because he did not appear at the foreclosure hearing before Judge Kimball on October 1, 2013. Moreover, Appellant never filed a Motion for a New Trial pursuant to Rule 59 of the South Carolina Rules of Civil Procedure or a Motion to Set Aside the

Judgment pursuant to Rule 60 of the South Carolina Rules of Civil Procedure. Thus, Appellant should not be allowed to raise these issues for the first time on appeal.

Even if Appellant had preserved his right to appeal on these issues, they have no merit as show by the arguments below:

1. THE LOWER COURT DID NOT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT APPELLANT'S APPEARANCE.

Rule 5(b)(1) of the SCRCP outlines the requirements for service of pleadings, including a notice of hearing, and states as follows: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to **him at his last known address** or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." (emphasis added).

The house being foreclosed is unoccupied. Respondent's counsel mailed the Appellant at his "last known address." Appellant never notified the court or counsel that

his address had changed. Therefore, because Respondent satisfied the requirements of SCRCP 5, the Lower Court's decision should not be disturbed on appeal.

2. THE TRIAL COURT DID NOT ERR IN ALLOWING A SURPRISE WITNESS TO TESTIFY.

Appellant states that the lower court should not have allowed the testimony of Rich Willits, Vice President of Respondent, because this witness was a "surprise" witness. To support his argument, Appellant cites Rule 33(b)(1), which is a portion of the standard interrogatories and states as follows: "In all cases **the following standard interrogatories may be served by one party upon another** unless otherwise ordered by the court for good cause shown. The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party. (1) Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements." (emphasis added).

Appellant never served any standard interrogatories and none of the interrogatories that he did serve contained a question similar to the one in SCRCP 33(b)(1). Therefore, because Appellant never served any standard interrogatories, the Lower Court's decision should not be disturbed on appeal.

3. THE TRIAL COURT DID NOT ERR IN CONSIDERING RESPONDENT'S WITINESS AS CREDIBLE.

Appellant argues that Mr. Willits was not a credible witness. The trial court, as trier of fact, "has the task of assessing the credibility, persuasiveness, and weight of the evidence presented," and this court must affirm the factual findings of the trial court "unless no evidence reasonably supports those findings". Jones v. Leagan, 384 S.C. 1, 13, 681 S.E.2d 6, 12 (Ct. App. 2009). However, Appellant fails to show that no evidence supports the lower court's findings. Moreover, Mr. Willits' factual testimony is almost verbatim to the facts contained in the Affidavit of Susan Walker, which was presented to support Respondent's motion for summary judgment and which was addressed by this Court in the prior appeal. Therefore, the Lower Court's decision should not be disturbed on appeal.

4. THE COURT DID NOT ERR IN PUTTING THE PROPERTY UP FOR SALE WHERE APPELLANT WAS ALLEGEDLY NOT GIVEN NOTICE OF SALE.

Appellant claims that he never received notice regarding the foreclosure sale. This issue is moot because Appellant filed a Chapter 7 bankruptcy petition before the sale, and thus, the sale was cancelled. On October 1, 2013, Judge Jackson Kimball signed a notice of sale stating that the foreclosure sale of Appellant's property be held on Monday, November 4, 2013 at 11:00 AM. However, on Friday, November 1, 2013 at 11:45 AM, Appellant filed Chapter 7 bankruptcy case number 13-06566 in the United States Bankruptcy Court for the District of South Carolina (Notice of Bankruptcy Filing, ROA

163). Therefore, the foreclosure sale never took place on November 4, 2013, and thus, the Lower Court's decision should not be disturbed on appeal.

5. THE COURT DID NOT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT REQUIRING RESPONDENT TO PROVIDE A BOND.

Appellant argues that the lender in a foreclosure proceeding is required to post a bond. As a general rule, service of notice of an appeal stays the matters decided in the judgment under appeal. Rule 225(a), SCAR. That rule does not, however, apply to appeals in mortgage foreclosure cases. Under S.C. Code Ann. § 18-9-170, an appeal from a judgment directing the sale of real property (such as a foreclosure decree) does not stay the sale, unless an appeal bond is posted. S.C. Code Ann. § 18-9-170 (1976); Rule 225(b)(4), SCAR; Carsten v. Wilson, 241 S.C. 516, 129 S.E.2d 431 (1963); Muckenfuss v. Fishburne, 68 S.C. 41, 46 S.E. 537 (1903). A foreclosure defendant may not avoid the bond requirement in that statute by otherwise petitioning the appellate court for a stay. Ex Parte Andrews, 152 S.C. 325, 150 S.E. 313 (1929). Absent the posting of an appeal bond, it is the duty of the Master-in-Equity to proceed with the sale. Id.

The provisions of S.C. Code Ann. §18-9-130, which require a plaintiff to post a bond prior to selling property to satisfy a judgment under appeal, do not apply to mortgage foreclosures, Carsten v. Wilson, 241 S.C. 516, 129 S.E.2d 431 (1963), and the plaintiff in a mortgage foreclosure action is not required to post a bond to proceed with the foreclosure sale after a notice of appeal has been filed. Id. Section 18-9-130 is limited in application to sales under execution to enforce a money judgment. Id. Therefore, the

Respondent was not required to post a bond, and thus, the Lower Court's decision should not be disturbed on appeal.

6. **THE COURT DID NOT ERR IN NOT TAKING THE APPELLANT'S POSITION, AS APPELLANT WAS NOT PRESENT AT THE HEARING.**

Appellant argues that because he was not present at the hearing, Judge S. Jackson Kimball, III, Master-In-Equity for York County, should have argued his case for him. However, Judge Kimball could not take the position of the Appellant because such a position would violate Canon 3 regarding judicial conduct, which requires that judges be impartial. Therefore, the Lower Court's decision should not be disturbed on appeal.

7. **THE COURT DID NOT ERR IN GRANTING FORECLOSURE WHEN RESPONDENT ALLEGEDLY NEVER PROVIDED ALL OF THE DISCOVERY RESPONSES THAT APPELLANT REQUESTED.**

Appellant argues that the lower court erred in not compelling Respondent to respond to some of his discovery requests. However, Appellant's discovery arguments were clearly addressed in his first appeal to this Court, (Case Tracking No.: 2010150386), and thus, he should be barred by res judicata or issue preclusion from raising these same issues again in the second appeal (Order Affirming Summary Judgment, ROA 12-17).

In order for res judicata to operate as a bar, the following elements needed to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992). The term res judicata encompasses two types of preclusion: claim preclusion and issue preclusion. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C., 1997) citing Pedrina v. Chun, 906 F.Supp.

1377 (D.Hawai'i 1995). "Issue preclusion and claim preclusion have historically been called collateral estoppel and bar or merger respectively." Id. Issue preclusion bars re-litigation of particular issues actually litigated and decided in the prior suit." Id.

In the present case, the first two elements of res judicata have clearly been satisfied because we have a second appeal from the same foreclosure proceeding. As for the identity of the issues raised in both appeals, Appellant makes no reference to any factual findings or issues other than the ones raised in the first appeal. Moreover, no discovery motions were filed by either party after Appellant filed his first notice of appeal. Therefore, the Lower Court's decision should not be disturbed on appeal.

8. THE COURT DID NOT ERR IN ALLOWING THE FORECLOSURE HEARING TO PROCEED BEFORE THE SOUTH CAROLINA SUPREME COURT REACHED A DECISION ON APPELLANT'S WRIT OF CERTIORARI.

Appellant argues that the lower court should not have entered the order allowing the foreclosure sale because the South Carolina Supreme Court had no yet ruled on his to review this Court's decision in SunTrust Mortgage, Inc. v. Ostendorff, Op. No. 2012-UP-608 (S.C. Ct. App. Filed Nov. 14, 2012). This issue is moot because on August 21, 2014, the South Carolina Supreme Court denied Appellant's writ of certiorari (Order denying Petition for Writ of Certiorari, ROA 151-162). Moreover, it is a basic principal that a court reviewing a case on a writ of certiorari must "confine its review to the correction of errors of law only, and will not review the findings of fact of an inferior Court or body except when such findings are wholly unsupported by the evidence." Pettiford v. South Carolina State Bd. of Educ., 218 S.C. 322, 62 S.E.2d 780 (1950). Thus, because

Appellant has failed to show that the facts are wholly unsupported by the evidence, any higher court decision regarding the writ would not disturb the lower court's factual findings. Therefore, the Lower Court's decision should not be disturbed on appeal.

9. **THE COURT DID NOT ERR IN DETERMINING THE JUDGMENT AMOUNT BEFORE THE SOUTH CAROLINA SUPREME COURT REACHED A DECISION ON APPELLANTS WRIT OF CERTIORARI.**

   See response to argument number 8 above.

10. **THE COURT DID NOT DENY APPELLANT DUE PROCESS SIMPLY BECAUSE HE WAS NOT PRESENT AT THE FORECLOSURE HEARING.**

"The fundamental requirement of due process is the **opportunity** to be heard at a meaningful time and in a meaningful manner." (emphasis added). S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995) (internal quotation marks omitted). "Due process does not mandate any particular form of procedure. Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." Id. (internal quotation marks omitted). Therefore, because Respondent was provided the opportunity to be heard, his due process rights were not violated and the Lower Court's decision should not be disturbed on appeal.

11. **THE COURT DID NOT DENY APPELLANT EQUAL PROTECTION OF THE LAW SIMPLY BECAUSE HE WAS NOT PRESENT AT THE FORECLOSURE HEARING.**

No person shall be denied equal protection of the law. U.S. CONST. AMEND. XIV, § 1; S.C. CONST. ART. I, § 3; Sunset Cay, L.L.C. v. City of Folly Beach, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). However, Appellant fails to show how South Carolina law treated him differently from similarly situated persons or created different classes of individuals. Therefore, the Lower Court's decision should not be disturbed on appeal.

12. DID THE COURT DENY APPELLANT DUE PROCESS AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE RESPONDENT WAS NOT ORDERED TO PROVIDE DISCOVERY.

See response to argument numbers 7 and 10 above.

13. DID THE COURT DENY APPELLANT EQUAL PROTECTION OF THE LAW AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE RESPONDENT WAS NOT ORDERED TO PROVIDE DISCOVERY.

See response to argument number 7 and 11 above.

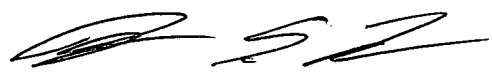
CONCLUSION

It is respectfully submitted that Lower Court's order, which allowed the foreclosure of the real property at issue, was supported by competent evidence. Therefore, this Court should find no error in the judgment below.

Dated: February 23, 2015.

Respectfully Submitted,

TATUM LAW FIRM, PLLC



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